

**UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

GARRETT NEMEC,
Appellant

v.

ROBERT A. McDONALD,
Secretary of Veterans Affairs,
Appellee

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Vet. App. No. 15-2018

JOINT MOTION FOR REMAND

Pursuant to U.S. Vet. App. R. 27 and 45(g), the parties move the Court to vacate the January 28, 2015, decision of the Board of Veterans' Appeals ("Board") denying Appellant entitlement to service connection for degenerative disc disease (DDD) of the lumbar spine and to remand the matter for further proceedings consistent with this motion.

BASIS FOR REMAND

The parties agree that remand is necessary because the Board failed to support its decision with an adequate statement of reasons and bases. See *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). The Board is required to provide a written statement of the reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record and that statement must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court. 38 U.S.C. § 7104(d)(1);

Allday v. Brown, 7 Vet.App. 517, 527 (1995); *Simon v. Derwinski*, 2 Vet.App. 621, 622 (1992); *Gilbert*, 1 Vet.App. at 57.

In the instant case, the evidence of record shows that Appellant's February 1960 service entrance examination revealed an abnormal spine examination, specifically, "Flattening of the lumbar curve." (Record (R.) at 214 (214-15)). Additionally, Appellant's August 1960 Air Controlman Candidate examination shows an abnormal spine examination, specifically, "Mild flattening of the lumbar curvature. No limitation of motion." (R. at 216 (216-17)). Finally, December 1962 entries in Mr. Nemec's service medical record note that he suffered back pain, and was prescribed heat and a muscle relaxant. (R. at 222).

The Board, in its decision, denied Appellant's claim of entitlement to service connection for DDD of the lumbar spine, finding that he had "acute and transitory back pain in service, and that his current back pain is not causally related to, or aggravated by, active service." (R. at 16 (3-17)). In doing so, however, it failed to discuss, or even mention, the evidence showing that Appellant had an abnormal spine examination with flattening of the lumbar spine on his entrance examination and at his Air Controlman Candidate examination; and, it failed to provide analysis regarding the issue of aggravation. Accordingly, the parties agree that the Board's cursory conclusion that Appellant's current back pain was not aggravated by service is not supported with an adequate statement of reasons or bases. *Gilbert*, 1 Vet.App. at 57.

The parties agree that that this is particularly problematic because the

Board, in denying Appellant's claim for service connection, found the December 2010 VA opinion and its December 2011 addendum to be the most probative opinions of record. (R. at 12 (3-17)). Although the VA examiner noted Appellant's entrance examination findings of "flattening of the lumbar spine[.]" he failed to provide any opinion regarding aggravation in either his December 2010 VA opinion or his December 2011 addendum opinion. (R. at 192 (192-94); 111-12)). Rather, the examiner opined that Appellant's current lumbar spine condition is due to aging and not caused by or a result of military service. (R. at 194 (192-94)). In his December 2011 addendum opinion, he clarified that Appellant's "current spinal problem was not caused by or a result of military service." (R. at 111 (111-12)). Because the VA examiner failed to specifically address the issue of aggravation in both opinions, the parties agree that on remand the Board should address whether such examinations are adequate for rating purposes, and if not, whether a new examination is necessary to address the issue of aggravation.

On remand, Appellant will be free to submit additional evidence and argument on the questions at issue. "The Court has held that '[a] remand is meant to entail a critical examination of the justification for the decision.'" *Kahana v. Shinseki*, 24 Vet.App.428, 437 (2011) (quoting *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991)). Upon remand, the Board must "reexamine the evidence of record, seek any other evidence the Board feels is necessary, and issue a timely, well[]supported decision in this case." *Fletcher*, 1 Vet.App. at 397.

On remand the Board must ensure compliance with all relevant provisions of 38 U.S.C. §§ 5103, 5103A and 38 C.F.R. § 3.159. See *Pelegriani v. Principi*, 18 Vet.App. 112 (2004); *Nolen v. Gober*, 14 Vet.App. 183 (2000) (per curiam order).

In any subsequent decision, the Board must set forth adequate reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record. See 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 57. Finally, the parties respectfully request that the Court expressly incorporate the terms of this motion into the order, and that the Court remand this appeal for further action consistent with the foregoing. See *Forcier v. Nicholson*, 19 Vet. App 414, 425 (2006), *affirmed* 221 Fed. Appx. 996, 2007 U.S. App. LEXIS 8738 (Fed. Cir. 2007)(“The duty to ensure compliance ‘personally’ arises when the Secretary agrees to the specific terms of a motion for remand, and, based upon his position as “the head of the Department”, he can be held accountable for this responsibility.”)

WHEREFORE, the parties respectfully move the Court to vacate the January 28, 2015, decision of the Board denying entitlement to service connection for DDD of the lumbar spine, and to remand the matter for action consistent with the foregoing discussion.

Respectfully submitted,

FOR APPELLANT:

6/1/2016
Date

/s/ Chris Attig
CHRIS ATTIG, ESQ.
Attig Law Firm, PLLC
P.O. Box 7775
San Francisco, CA 94120-7775
(866) 627-7764

FOR APPELLEE:

LEIGH A. BRADLEY
General Counsel

MARY ANN FLYNN
Chief Counsel

/s/Selket N. Cottle
SELKET N. COTTLE
Deputy Chief Counsel

6/1/2016
Date

/s/ Laura Bernasconi
LAURA BERNASCONI
Appellate Attorney
Office of General Counsel (027I)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-6906